

N O. 2 1 7 5 9

MAY 5 1968

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT CLAYTON BUICK,

Appellee,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S SUPPLEMENTAL BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

FILED

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WM. B. LUCK CLERK

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APPELLEE'S SUPPLEMENTAL BRIEF

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I

SUPPLEMENTAL STATEMENT

Subsequent to the filing of appellee's brief, appellant, Robert Clayton Buick (hereinafter referred to as Buick), filed a brief entitled "Supplement Opening Brief of Appellant and Petition for Correction of Record". This brief was filed by appellant in pro se. The original opening brief for appellant was filed by his counsel of record, Mrs. Gladys Towles Root. Pursuant to a written directive from the Clerk of the Ninth Circuit, appellee files this supplemental brief in response to the contentions and allegations contained in appellant's supplemental opening brief. As to





appellant's petition for correction of record, an opposition to said petition is being answered under separate cover by appellee, entitled "Opposition to Petition for Correction of Record".

## II

### SUPPLEMENTED SPECIFICATIONS OF ERROR

In appellant's supplemental brief there are listed six allegations of error committed in the District Court, the majority of which were specifically raised in appellant's opening brief. For purposes of this response these allegations will be grouped together where they appear to relate to the same alleged error:

1. Appellant specifies in errors one and two that there exists error in the record because of the Government's allegedly knowing use of perjured testimony in the trial.

2. Appellant contends in errors three, four and five that the arrest and subsequent search of appellant was illegal and, therefore, any evidence derived from this search was improperly admitted into evidence.

3. Did the District Court commit error in allowing identification witness testimony when said witnesses had observed the defendant in a line-up where he had appeared without the presence of counsel?



### III

#### ARGUMENT

- A. A REVIEW OF THE REPORTER'S TRANSCRIPT OF THIS TRIAL AND IN LIGHT OF THE SUBSEQUENT DISTRICT COURT'S REFUSAL TO CORRECT DENIAL OF APPELLANT'S MOTION TO CORRECT THE RECORD, THERE IS NO EVIDENCE THAT ANY PERJURY WAS UTILIZED IN THE CONVICTION OF BUICK, AND THIS CONTENTION IS FRIVOLOUS.
- 

Appellant again reiterates the position raised in the opening brief that there was communication between the wife of an FBI agent in the courtroom and prospective witnesses. However, a review of the record of the trial (pp. 842-845), will clearly show that this question was presented to the District Court judge, that all relief sought was granted and that the appellant's allegation of the facts is without any justification. On appeal from a conviction the evidence is to be viewed in a light most favorable to the prosecution.

William v. United States, 273 F.2d 781, 799

(9th Cir. 1959), cert. denied

362 U.S. 951 (1960).

Based upon the evidence in this case the Court should dismiss appellant's contention as being frivolous.

A review of the order denying appellant's attempt to correct the record, attached to appellee's opposition filed herein, will show the factual allegations of appellant are incorrect.



Appellant also alleges that the arresting officers consciously committed perjury because of some alleged discrepancies in their testimony as to where appellant was located at the time of his arrest. A review of the pertinent facts in this case as set forth in the statement of facts of appellee's brief and of the arguments contained in the brief concerning the testimony of the arresting officers will show that no major discrepancy exists in the testimony, clearly not a sufficient discrepancy to justify an allegation of perjury. Again appellee respectfully submits that when the evidence is viewed in the light most favorable to the appellee that this contention must be considered totally without merit, frivolous and not submitted in good faith.

Appellant's contention that the Derringer pistol was obtained pursuant to an unreasonable search and seizure is based upon a misstatement of the evidence. It is respectfully submitted that appellant's allegations concerning the alleged illegal search and seizure are adequately answered in appellee's brief, pages 11 to 15.

Appellant has attempted to extend contention of illegally obtained evidence as submitted in the opening brief, to cover the photographs of the Buick station wagon used in the robberies and identified by Mr. Kendrick [R. T. 624-629]. The objection made to these exhibits is based upon the legality of the arrest and search [R. T. 296]. Appellee relies upon the validity of the arrest as submitted in appellee's brief on file herein, to show that the arrest and search was legal.



B. APPELLANT WAS NOT DEPRIVED  
OF HIS SIXTH AMENDMENT RIGHT  
TO COUNSEL BY BEING COMPELLED  
TO PARTICIPATE IN A POLICE LINE-  
UP WITHOUT THE ASSISTANCE OF  
COUNSEL.

---

The three cases handed down on June 12, 1967, by the Supreme Court which held that an individual is entitled to have the aid of counsel at a line-up was specifically held not to be retro-active in its application. See United States v. Wade, 388 U.S. 218 (1967); United States v. Gilbert, 388 U.S. 263 (1967) and Stovall v. Denno, 388 U.S. 293 (1967). The present case was tried prior to these decisions, the trial commencing on October 11, 1966 [C. T. 87] and ending on October 19, 1966 [C. T. 97].

In Stovall v. Denno, id., at 296, the court specifically held:

"Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. (citing cases) These cases establish the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application' . . . ."

The court further stated that:

"Wade and Gilbert fashion exclusionary





rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel."

The court held:

"It is, therefore, very clear that retroactive application of Wade and Gilbert 'would seriously disrupt the administration of our criminal laws. '

. . . We conclude, therefore, that the Wade and Gilbert rules should not be made retroactive.

"We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable. We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. "

Id. at 300.

Appellant's argument contains numerous allegations of fact

that are not supported by any reference to testimony contained in



the record. It is, therefore, respectfully submitted that any argument based upon the imagination of the appellant be disregarded by this Court. Further, in light of the specific holding in the Stovall v. Denno, *ibid* and the reasons given therein, it is respectfully submitted that appellant is not entitled to relief because of the absence of counsel.

Respectfully submitted,

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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird

DENNIS E. KINNAIRD

